

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

**IN THE PROCEEDING BETWEEN**

**PERENCO ECUADOR LTD.**

Claimant

**- AND -**

**THE REPUBLIC OF ECUADOR  
AND  
EMPRESA ESTATAL PETRÓLEOS DEL ECUADOR (PETROECUADOR)**

Respondents

(ICSID Case No. ARB/08/6)

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**DECISION ON PROVISIONAL MEASURES**

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*Members of the Tribunal*

The Right Honourable Lord Bingham of Cornhill, President of the Tribunal  
The Honourable Judge Charles N. Brower, Arbitrator  
Mr. J. Christopher Thomas, Q.C., Arbitrator

*Secretary of the Tribunal*

Mr. Marco Tulio Montañés-Rumayor

*Representing the Claimant*

Mr. Mark W. Friedman  
Ms. Yulia Andreeva  
Debevoise & Plimpton LLP

Mr. Gaëtan J. Verhoosel  
Ms. Carmen Martínez López

*Representing the Respondents*

Republic of Ecuador  
Dr. Diego Garcia Carrión  
Procurador General del Estado  
and  
Dr. Álvaro Galindo C.  
Director Nacional de Patrocinio Internacional  
Procuraduría General del Estado  
and  
Messrs. Pierre Mayer and  
Eduardo Silva Romero  
Dechert LLP

Empresa Estatal Petróleos del Ecuador  
(Petroecuador)  
Contralmirante Luis Aurelio Jaramillo Arias  
Presidente Ejecutivo

**Date of Decision: May 8, 2009**

### *The Request for Arbitration*

1. On 30 April 2008 Perenco Ecuador Limited, the Claimant in these proceedings, filed a request for arbitration with ICSID against the Republic of Ecuador and Empresa Estatal Petróleos del Ecuador. The parties will be hereinafter referred to as “Perenco”, “Ecuador” and “Petroecuador”.

2. The dispute between the parties concerns two Participation Contracts to which Perenco became a party on 4 September 2002. One of these is a Participation Contract for Exploration and Exploitation of Hydrocarbons in Block 21 of the Amazon Region (“the Block 21 Participation Contract”) and the other is the Contract Modifying the Service Contract to a Participation for the Exploration and Exploitation of Hydrocarbons in Block 7 of the Amazon Region, including the Contract for the Coca-Payamino Unified Field (“the Block 7 Participation Contract”). These will be referred to as “the Participation Contracts”. Perenco also entered into Joint Operating Agreements with the other entities holding interests in Blocks 7 and 21. It is now the sole operator and majority holder of Participating Contract rights in both Blocks, holding a 53.7% interest in Block 21 and a 57.50% interest in Block 7. The remaining interest in both Blocks is now held by Burlington Resources Oriente Limited (“Burlington”), with which Perenco has formed a Consortium.

3. Under the Participation Contracts the Consortium has the right and duty to carry out oil exploration and production activities in the areas to which the contracts relate. Pursuant to the contracts Perenco contends that it has invested large sums in personnel, equipment, machinery, technology, infrastructure and goods and services. This contention has not at this stage been investigated, but it is not understood to be in dispute.

4. Under the Participation Contracts Perenco was to be entitled to a share of the oil produced in the two Blocks. A share was also allotted to Ecuador. The size of the parties’

respective shares was defined in section 8.1 of each of the Contracts according to a prescribed formula. The formula provided that as the volume of production rose, the percentage share of Ecuador would increase to a specified extent and that of Perenco decrease. The Contracts made no express reference to the sale price or value of the oil produced.

5. During the currency of the Participation Contracts the price of oil rose.

6. On 1 March 2006 the President of Ecuador submitted a bill to Congress proposing an amendment of the Hydrocarbon Law (“the HCL”). Congress enacted this bill, known as “Law 42”, on 19 April 2006. This added to the HCL an article which provided (in translation provided by the Claimant):

“Participation of the State in surplus prices from the sale of oil and gas not agreed upon or not foreseen.

Contractor companies that maintain participation contracts for the exploration and exploitation of hydrocarbons in effect with the Ecuadorian state under this Law, without prejudice to the volume of crude oil subject to participation that corresponds to them, when the effective monthly medium price of FOB sale of Ecuadorian oil petroleum goes above the monthly average prices in effect at the time of the execution of the contract, expressed in constant prices for the month of liquidation, will recognize in favour of the Ecuadorian state a participation of at least 50% of the extraordinary income generated by the difference in price. For the purposes of this Article, extraordinary revenues shall be understood to mean the difference in the above-described price, multiplied by the number of barrels produced.

The price of crude oil as of the date of the contract used as a reference for calculation of the difference shall be adjusted, considering the Consumer Price Index of the United States of America, published by the Central Bank of Ecuador”.

The Participation Contracts made no reference to the monthly average FOB price of Ecuadorian oil at the time of the execution of the Contracts and did not allot Ecuador a participation of as much as 50% in the price or value of any of the oil produced.

7. Ecuador’s Ministry of Mines and Petroleum notified Perenco of the prices said to have been in effect at the time of execution of each of the Participation Contracts. These

prices, adjusted for inflation, were thereafter treated as “the reference prices”: Ecuador’s increased participation was, under Law 42, in revenues from all sales above the reference prices.

8. On 11 July 2006, the Government of Ecuador issued Decree No 1672 to implement Law 42. This set the percentage of the “extraordinary income” payable to the State at 50%. Payments were to be made monthly.

9. In a decision of the Constitutional Court of Ecuador published in the Official Register No 350 dated 6 September 2006, Law 42 was held to be constitutional.

10. On 4 October 2007 Ecuador issued Decree No 662. This amended Decree No 1672 by substituting 99% for 50% as the percentage of extraordinary income payable to the State. Thus on oil sales at prices above the reference prices Ecuador became entitled, according to quantity, to the agreed contractual percentage of the price up to the reference prices and to 99% of the sale price of oil sold above that price.

11. Until the end of April 2008 Perenco made the payments required under Law 42 without prejudice to its rights and under protest. Meanwhile, the parties attempted to negotiate a compromise solution, but on 12 April 2008 the President of Ecuador announced that he had stopped further negotiations. Following that announcement, Perenco on 30 April requested arbitration. Burlington had, on 21 April 2008, made a similar request. Since then it has withheld payment of sums required under Law 42. In a letter dated 19 June 2008 to the Minister of Mines and Petroleum and Petroecuador, Perenco expressed willingness to transfer the disputed Law 42 payments into an escrow account maintained by an independent escrow agent in a neutral location pending resolution of the dispute, but this offer was not accepted.

12. There were protracted negotiations in the closing months of 2008, but these did not lead to a settlement. On 21 January 2009 the Minister of Mines and Petroleum announced that negotiations to have Perenco continue operating in Ecuador had become “practically impossible” and that the Government would now seek early termination of the Participation Contracts. He said the Government was going towards termination of the contracts, and would see whether the wells should be permanently closed, or left on stand-by or taken over by Ecuador.

13. On 14 February 2009 the President of Ecuador announced that he had ordered “coercive measures” against Perenco and Burlington because they had “not paid their taxes on extraordinary gains (due to the high price of crude)”. He was reported as saying (in translation) that “these companies can go wherever they like. This country will not pay attention to extra-regional authorities that attempt to tell us what to do or not to do”. The Minister of Mines and Petroleum told Reuters that the companies would “either pay the debt or their stuff will be seized”.

14. On 19 February 2009 Ecuador issued two enforcement notices against Perenco (known as *coactivas*), one in the sum of US\$171,782,211.00 and the other in the sum of US\$155,685,236.00. In material part the notices read, in translation (provided by the Claimant),

“Given that the aforementioned debt is liquid, specific and past due, the debtor is ordered to pay within THREE DAYS or to supply within the same amount of time equivalent goods for attachment, being notified that the goods to be attached will be equivalent to the debt, interest and costs ...”

Under the law of Ecuador such notices may be challenged if the full sum claimed is deposited. By that law three such notices must be issued before enforcement action is taken. On 22 February 2009 two further notices were issued and served and on 25 February 2009 the third and final *coactiva* notices were issued and served on Perenco.

15. On Thursday 26 February 2009 the Minister of Mines and Petroleum was reported as saying that the deadline for Perenco to pay US \$327 million would end (in translation provided by the Claimant) “next Monday”, *i.e.* 2 March 2009. He indicated that legal action against Perenco would continue.

16. On 3 March 2009 the Court of Enforcement of Petroecuador ordered the seizure of the production and shipments of Napo Crude that were the property of Perenco, as stipulated in the Participation Contract for Block 21, until such time as the entire amount of Perenco’s debt had been settled.

### ***The arbitration***

17. Briefly summarised, Perenco’s central complaint in its Request for Arbitration is that, on becoming party to the Participation Contracts, it acquired certain enforceable and potentially valuable contractual rights; that in reliance on those rights it invested large sums in the exploration for and production of oil in Ecuador; that Ecuador, by enacting and giving effect to Law 42, radically and unilaterally altered, to the disadvantage of Perenco, the terms on which Perenco had agreed to operate and had operated in Ecuador; and that such alteration violated the terms of both the Participation Contracts and the Investment Treaty between the Governments of France and Ecuador (Agreement between the Government of the Republic of France and the Government of the Republic of Ecuador concerning the reciprocal encouragement and protection of investments), which had come into force on 10 June 1996.

18. The Respondents, as they are entitled to do, have expressly reserved the right to challenge the jurisdiction of the Tribunal to entertain this claim. They have made no admissions concerning, and do not accept the characterisation of, the facts asserted by Perenco. They have made plain their rejection of the validity of Perenco’s complaint.

19. The Tribunal has formed, and expresses, no opinion on its jurisdiction to entertain this claim, on the facts so far as these are in dispute, or on the merits of the claim. These issues are not before it for decision at this stage and have not been the subject of argument.

### **Perenco's application for provisional measures**

20. In its Request for Arbitration dated 30 April 2008 Perenco requested provisional measures in these terms:

“43 In order to preserve Perenco's rights under the Treaty until the dispute has been adjudicated on the merits, Perenco requests the Tribunal to order provisional measures pursuant to Arbitration Rule 39. Pursuant to paragraph 1 of that Rule, Perenco hereby specifies: (a) the rights to be preserved; (b) the measures the recommendation of which is requested; and (c) the circumstances that require such measures:

- (a) The rights to be preserved. As shown above, Perenco holds acquired rights of substantial value under the Participation Contracts, including the right to receive in full its contractually agreed participation and to enjoy the economic benefit of the sale of that participation.
- (b) The measures the recommendation of which is requested. Perenco respectfully requests that, until it has rendered an award on the merits, the Tribunal enjoin Respondents from: (i) pursuing any action to collect any payments Respondents claim are owed by Perenco pursuant to the HCL Amendment [Law 42]; and (ii) unilaterally amending, rescinding, terminating or repudiating the Participation Contracts or any term(s) thereof.
- (c) The circumstances that require such measures. As described above, Respondents demand monthly payments from Perenco pursuant to the HCL Amendment [Law 42]. As the *City Oriente* tribunal held in another ICSID arbitration involving the HCL Amendment [Law 42], such payment demands may “deprive[e] claimant of its lawful right to have its interests effectively protected”. In addition, if Respondents were to act on their threat to repudiate the Participation Contracts, the resulting harm to Perenco would be irreparable. Unless Respondents are enjoined from taking the above measures, it will therefore become significantly more difficult for the Tribunal to grant effective relief to Perenco”.

21. During the first session of the Tribunal, held on 7 February 2009 at the seat of the Centre in Washington DC, in the presence of the parties' counsel, Perenco did not then pursue its application for provisional measures but indicated that it would do so if settlement

negotiations proved fruitless and coercive action were taken against it. The Respondents expressed the hope that a settlement could be agreed.

22. By letter dated 18 February 2009 to the Tribunal, the Respondents' counsel confirmed that negotiations with Perenco had not reached a satisfactory conclusion and continued (in translation provided by counsel for the Respondents):

“Accordingly, the President and Minister of Mines and Petroleum of Ecuador have had no other alternative but to announce – in strict compliance with International Law, the Constitution, the laws and decrees of Ecuador – that a ‘coercive procedure’ will be promptly initiated – the result of which can be challenged before the Ecuadorian civil courts – against Perenco to demand that it pay the amounts it still owes pursuant to the obligations arising out of the application of Law 2006-42 and its regulatory decrees.”

The first *coactiva* notices were issued and served the following day (see paragraph 14 above), 19 February 2009.

23. On 19 February Perenco submitted its Application for Provisional Measures. It asked the Tribunal to enjoin the Respondents from forcibly collecting any of the Law 42 assessments in dispute in the arbitration and otherwise to preserve the *status quo* pending resolution of the claim. It contended that the request was urgent since the Respondents would begin seizing Perenco's assets in three days' time unless Perenco paid the Respondents US\$324 million [sic] in disputed Law 42 assessments. Reference was made to the President's announcement on 14 February (see paragraph 13 above), to the Respondents' letter of 18 February (paragraph 22 above) and to the first two *coactiva* notices served on 19 February (paragraph 14 above). Perenco asked the Tribunal to act swiftly to prevent aggravation of the dispute, impairment of the rights Perenco was seeking to enforce in the arbitration and interference with the Tribunal's ability to grant effective relief. Since forcible collection measures could take effect within three days, Perenco requested the Tribunal to issue immediately an order in the nature of a temporary restraint prohibiting Ecuador from undertaking any measures pending determination of the application for provisional measures.

Perenco contended, citing authority, that provisional measures were appropriate when necessary to prevent aggravation of the dispute or further injury to the party seeking the measures. Particular reliance was placed on the decisions of an ICSID Tribunal in *City Oriente Limited v Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No ARB/06/21), Decision on Provisional Measures (19 November 2007), para 55, and Decision on Revocation of Provisional Measures (13 May, 2008), para 72. If provisional measures were not granted, the very contractual and international law rights that were the subject of the arbitration would be impaired, probably irreversibly, and the Tribunal's ability to grant full relief would be compromised. Perenco further contended that provisional measures were necessary to preserve the exclusive jurisdiction of the Tribunal in accordance with Article 26 of the ICSID Convention. If the Respondents seized Perenco's bank accounts, equipment, property and other assets Perenco could not operate and would be put out of business. The sum demanded from Perenco included not only Law 42 assessments which it had withheld but also those withheld by its Consortium partner, Burlington. If the Blocks were not continuously operated, permanent damage could be done to them, and the Tribunal could not then restore Perenco to its original position.

24. Perenco accordingly requested the Tribunal to enjoin the Respondents from:

- “(a) Demanding that [Perenco] pay any amounts allegedly due pursuant to Law 42;
- (b) Instituting or further pursuing any action, judicial or otherwise, including the actions described in the February 19, 2009 notices, to collect any payments Respondents claim are owed by [Perenco] pursuant to Law 42;
- (c) Instituting or pursuing any action, judicial or otherwise, against [Perenco] or any of its officers or employees, arising from or in connection with the Participation Contracts; and
- (d) Unilaterally amending, rescinding, terminating, repudiating or [engaging] in any other conduct that may directly or indirectly affect or alter the legal situation under the Participation Contracts, as agreed upon by the parties.”

25. In a letter to the Tribunal dated 20 February 2009, Ecuador addressed Perenco's request of the day before for provisional measures and its application for a temporary restraining order pending determination of its request. Ecuador pointed out that under Rule 39(4) of the ICSID Arbitration Rules, the Tribunal's power to recommend provisional measures was subject to its having first given each party "an opportunity of presenting its observations". Ecuador agreed that a procedural schedule be established for the provisional measures phase, and proposed a timetable culminating in a hearing on 13 May 2009. By applying for temporary relief, Ecuador said, Perenco was seeking to circumvent the restriction which Rule 39(4) imposed on exercise of the Article 47 power. Perenco was seeking on an interim basis the very same orders for which it had applied in its request for provisional measures, without offering the Respondents any substantive opportunity to present their observations in response, and asking for an order "immediately". The Tribunal had no power to make those orders under Article 47 and Rule 39 and Perenco had not identified any source of power for the orders which it sought other than those contained in those two provisions. Neither the ICSID Convention nor the ICSID Arbitration Rules contained a power analogous to that in the Rules of Court of the International Court of Justice, which expressly authorized the President of the Court to make interim orders pending the outcome of a request for provisional measures. In only one instance – the *City Oriente v Ecuador* case cited by Perenco – had an ICSID Tribunal purported to deal with a request for an interim or temporary restraining order without hearing from the respondent. In that case the Tribunal, without hearing from Ecuador and five days after a request for "immediate" relief by the claimant, declined to make the orders sought and instead issued a "request" for the parties to maintain the *status quo* pending a determination by the Tribunal of the request for provisional measures. The Tribunal added that

"If either party intends to take any measure that may violate the provisions set forth herein, prior notice must be served on the Tribunal, granting enough time so that the Tribunal may proceed as appropriate" (translation provided by counsel for the Respondents).

Ecuador did not accept that the Tribunal had the power to make any “request” for the maintenance of the *status quo* to the government of a sovereign state charged with the obligation to apply its validly enacted laws. Nor was there any urgency for it to do so. Under Ecuadorian law, a notice of debt was required to be served on Perenco three times, and it was only after the expiry of three days from the final notice that any action could be taken to seize assets in satisfaction of an extant debt. Perenco was likely to be served with a second notice that day (Friday, 20 February). Since Monday and Tuesday of the following week (23 and 24 February) were holidays, the earliest that a third notice would be served was Wednesday, 25 February, and the three days for satisfaction of the debt would expire on the evening of Monday, 2 March. Ecuador understood that during this time the parties would continue to engage in discussions aimed at settlement. Ecuador recalled that at the first session on 7 February it had undertaken to inform the Tribunal of any changes in the *status quo*, and had done so by letter dated 18 February (paragraph 22 above) as soon as possible following a decision to commence the *coactiva* procedure. It now undertook to serve prior notice on the Tribunal, granting enough time for the Tribunal to act as necessary, before it would take any measure seeking to enforce the debts claimed in the first two *coactiva* notices issued on 19 February. Ecuador accordingly submitted that the only action the Tribunal need take in the existing circumstances was to fix a schedule for the briefing of Perenco’s request for provisional measures.

26. In a letter to the Tribunal dated 21 February, Perenco responded to Ecuador’s letter of 20 February, contending that the Tribunal had power under the Convention and the Rules to grant a temporary restraint, contending that Ecuador had had an opportunity to present its observations (which it had begun to do in its 20 February letter) and that in some situations, such as those obtaining here, it was necessary for a tribunal to grant a temporary restraint in order to preserve its ability to grant effective provisional relief. The letter repeated that Perenco could not continue to operate if its oil, working capital, equipment and other assets

were seized. The Tribunal could not wait until May, by which time the application would have become moot.

27. Ecuador wrote to the Tribunal on 24 February drawing attention to a recent order in the Burlington arbitration. In its letter Ecuador stated:

“We can also confirm, as [Perenco] knows, that neither Ecuador nor Petroecuador have commenced proceedings towards termination of the Blocks 7 and 21 participation contracts.”

By a letter of 23 February, Petroecuador had given notice confirming its agreement with the State’s position.

28. By letter to the parties dated 24 February 2009 the Tribunal referred to the parties’ recent communications and said:

“The Tribunal has carefully considered the situation described in the parties’ above-mentioned communications and has deliberated on this matter by telephone and email.

The Tribunal notes that in the last paragraph of its February 24 letter, Ecuador ‘confirm[s] ... that neither Ecuador nor PetroEcuador have commenced proceedings towards termination of the Blocks 7 and 21 participation contracts’. The Tribunal also observes that in its communication of February 23, PetroEcuador has aligned itself with Ecuador’s position. The Tribunal notes with approval the Respondents’ assurances.

The Tribunal believes it is necessary nonetheless, to request the parties to refrain from initiating or continuing any action or adopting any measure which may, directly or indirectly, modify the *status quo* between the parties *vis-à-vis* the participation contracts, including any attempt to seize any asset of [Perenco], until it has had an opportunity to further hear from the parties on the question of provisional measures.”

The Tribunal proposed to hold a hearing on provisional measures on 19 March 2009. On 26 February 2009 Ecuador noted the Tribunal’s request, but advised that it could not guarantee that seizures would not commence by 3 March 2009.

29. Ecuador’s Reply to Perenco’s Application for Provisional Measures was dated 26 February. It reserved its position on jurisdiction and the facts. It accepted that *coactiva*

notices had been served on 19, 22 and 25 February (paragraph 14 above) and that accordingly the Consortium would be obliged within three working days (*i.e.*, by 2 March 2009) to pay the debt due or face the risk that the debt would be collected through, amongst other things, the seizure of assets in a value equivalent to the debt asserted, plus interest and costs. In a cogent and well-argued pleading Ecuador contended that the recognised test for the grant of provisional measures, well-attested by authority, was that they were urgent and necessary to prevent a party suffering irreparable loss, *i.e.* loss which could not be adequately remedied by an award of damages if it were successful at the merits stage. The burden was on Perenco to prove such urgent necessity, and it could not do so. It was the more important that the test was fully satisfied if a sovereign State were to be restrained from implementing its validly enacted laws.

30. In resisting Perenco's application, Ecuador placed particular reliance on two points. The first was a statement by Burlington in its separate ICSID arbitration that

“[t]he Consortium has ... been paying all amounts under Law No 2006-42 into two segregated US accounts (one for each of the members of the Consortium). To date the Consortium has deposited US \$327.4 million in its US segregated accounts (US \$171.7 million for Block 7 and US \$155.7 million for Block 21)”.

The second point was Perenco's right under the law of Ecuador to challenge the *coactiva* notices on depositing the sum in dispute. These points made clear that Perenco's alleged predicament was of its own making since it could resolve its problem by paying the sum already held in a segregated US account either to Ecuador (to abide the event of the arbitration) or to the court. Ecuador pointed out that in its Request for Arbitration Perenco had complained that Ecuador had “expropriated” “Perenco's interests in the Participation Contracts without paying any compensation, and cited the decision of an ICSID tribunal in *Occidental Petroleum Corporation and another v Ecuador* (ICSID Case No ARB/06/11), Decision on Provisional Measures, 17 August 2007, for the proposition that provisional measures would not be granted where a harm suffered by a claimant was greater damages.

Perenco's reliance on Article 26 of the ICSID Convention was without merit, since that article did not preclude an investor from pursuing relief before local courts so long as the claims in question were distinct in nature from those to be asserted before the ICSID tribunal. No steps had been taken to terminate the Participation Contracts, and there was no suggestion that any proceedings, civil or criminal, had been or were threatened against Perenco or its officers and directors.

31. On 27 February Perenco again wrote to the Tribunal, noting its "request" and inviting it to make a "recommendation" under Article 47 of the ICSID Convention. The Tribunal on the same day told the parties that it regretted the stance adopted by Ecuador and that it would have to take a serious view of any failure to comply with its "request".

32. In its Reply on Provisional Measures dated 27 February 2009, Perenco complained that the service of the third and final *coactiva* notices appeared to violate both Ecuador's undertaking on 20 February to inform the Tribunal before taking any measure to enforce recovery of the disputed Law 42 payments (paragraph 25 above) and the Tribunal's "request" of 24 February that the parties refrain from "initiating or continuing any action ... which may, directly or indirectly, modify the *status quo* between the parties *vis-à-vis* the participation contracts, including any attempt to seize any assets of [Perenco]". Perenco now faced the seizure of its assets on 2 March, which would put it out of business.

33. Perenco challenged the proposition that a prospect of irreparable harm had invariably to be shown before provisional measures would be granted, but contended that the test was in any event satisfied on the present facts. It contended that it should not have to choose between making the disputed payments and being shut down, but further challenged the factual basis of Ecuador's contention that it could resolve its problem by paying over the sum of \$327 million allegedly held in a US account, since that figure represented payments required (by Law 42) from both members of the Consortium (Burlington as well as Perenco)

and Perenco had no power or authority to make payments on behalf of Burlington. Since Perenco could only suspend the forcible collection process by posting a bond for the full amount said to be due from it and Burlington with the Ecuadorian court, which it could not do, it would in any event be infringing the exclusive jurisdiction of the Tribunal, in breach of Article 26 of the Convention, since it would be engaging in an adversarial process regarding the rights at issue in the arbitration.

34. On 3 March 2009 (paragraph 16 above) steps were taken to seize assets of Perenco.

35. In view of further letters received from the parties, the Tribunal emailed a letter to the parties dated 5 March 2009 in which it quoted from its letter of 24 February (paragraph 28 above) and said:

“The Tribunal wishes to make it clear, in view of the parties’ most recent exchange of correspondence, that its February 24, 2009 *request* had and continues to have the same authority as a *recommendation*, as envisaged in Article 47 of the ICSID Convention and Arbitration Rule 39”.

36. Ecuador’s Rejoinder to Perenco’s Application for Provisional Measures was dated 6 March 2009. It emphasised that provisional measures may be ordered only if they are necessary and urgent. The test is one of irreparable prejudice. Substantial prejudice is not enough. They should not be ordered where a party, if ultimately successful, would be adequately compensated by damages. Here, Perenco could be so compensated. By complaining of expropriation it had chosen a remedy inconsistent with a right to performance. The relief sought was a disproportionate interference with the sovereignty of Ecuador. Moreover, Perenco could not show that the threat to its rights was caused by Ecuador, which was entitled to look to Perenco as legal representative of the Consortium for payment of the debt owed by the Consortium and was not concerned in the relationship between Perenco and Burlington.

37. By a letter to the Tribunal dated 11 March 2009, Ecuador complained that the Tribunal's letter of 5 March (paragraph 35 above), "changing" its "request" of 24 February into a "recommendation", potentially exposed Ecuador *ex post facto* to the threat of punitive consequences for any violation of that request in the intervening period and was a serious violation of Ecuador's right to procedural fairness. The Tribunal had no power to make a recommendation without first deciding that application on the merits, which the Tribunal had not done. Ecuador reserved all its rights.

38. A full hearing of Perenco's application for provisional measures took place in Paris on 19 March, when the parties' counsel helpfully explained and elaborated the contentions advanced in the pleadings. At the conclusion of the hearing the President made clear that the request made on 24 February and the recommendation notified on 5 March were to be treated as in force unless or until they were expressly revoked.

### **Jurisdiction**

39. While the Tribunal need not satisfy itself that it has jurisdiction to determine the merits of this case for the purposes of ruling on the application for provisional measures, it will not order such measures unless there is at least a *prima facie* basis upon which such jurisdiction might be established: *Victor Pey Casado and President Allende Foundation v Chile* (ICSID Case No ARB/98/2), Decision on the request for provisional measures, 25 September 2001, paragraphs 1-12. It is not enough for the Tribunal that the Secretary-General has found that the dispute is not manifestly outside the jurisdiction of the Centre and has therefore registered the Request for Arbitration under Article 36(3) of the ICSID Convention and Rule 6(1)(b) of the Institution Rules. The Tribunal must be satisfied there is a *prima facie* basis for jurisdiction. Under the terms of Article 9 of the Investment Treaty (see paragraph 17 above), Ecuador consented "to submit any legal dispute arising between this Contracting Party and a national or a company of the other Contracting Party relating to

an investment, to [ICSID], for conciliation or arbitral settlement in application of the [ICSID] Convention ...” In Article 1 “investment” was defined to include “assets, rights and interests of all kinds” and “companies” was defined to refer to “any legal entity which is controlled by the nationals of one of the Contracting Parties”. It is said that Perenco is and has at all material times been controlled by French nationals.

40. By letter dated 17 October 2007 Perenco expressly accepted and granted its consent for Ecuador’s offer to submit any dispute related to Law 42 or any other measure that might affect Perenco’s investments in Ecuador to ICSID for resolution by arbitration. For purposes of Rule 2(3) of the Institution Rules, 17 October 2007 was the date on which, it appears, the parties agreed to submit the dispute to ICSID. Petroecuador appears to have given its consent to the jurisdiction of ICSID in clause 20.3 of the Block 7 Participation Contract and clauses 20.2.19 and 2.20.20 (*sic*) of the Block 21 Participation Contract. The Participation Contracts were executed on 23 March 2000 and 20 March 1995 respectively, and Perenco became a party to them by an agreement notarised on 4 September 2002. The date of consent as between Perenco and Petroecuador was accordingly, for purposes of Rule 2(3) of the Institution Rules, 4 September 2002.

41. The Tribunal is of the opinion, at this stage, that Perenco has shown a *prima facie* basis upon which jurisdiction may be established, and this has not been contested.

### **Provisional Measures**

42. Article 47 of the ICSID Convention provides:

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

This language largely reproduces that of Article 41 of the Statute of the International Court of Justice and has been interpreted in a similar sense. Rule 39 of the ICSID Arbitration Rules (2006) provides, in material part:

“(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

...

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests”.

(This last paragraph corresponds to numeral (5) in the 1985 ICSID Arbitration Rules).

43. Article 47 and Rule 39 recognise that the rights which a party asserts and seeks to preserve and protect in an arbitral proceeding may be effectively destroyed or seriously prejudiced by the action of the other party taken before a Tribunal is able to reach a final decision on the merits of the dispute between them. Thus power is conferred on the Tribunal to restrain such action in order to preserve the effectiveness and integrity of the proceeding and avoid severe aggravation of the dispute. But the Article and the Rule also recognise that a Tribunal must be slow to grant to a party, before a full examination of the merits of the case, a remedy to which, on such examination, the party may be found to be not entitled. The Tribunal must be even slower where, as here, the jurisdiction of the tribunal to entertain the dispute has not been established. So the test laid down by the Article for the grant of

provisional measures is a stringent one: “if [the Tribunal] considers that the circumstances so require”. The question is one for the judgment of the Tribunal: “if it considers”. If the Tribunal does not consider that the circumstances require the grant of provisional measures, it may not grant them. If it considers that circumstances do so require it may grant provisional measures and is ordinarily likely to do so. But it will not judge that circumstances require the grant of provisional measures unless it judges such measures to be necessary and urgent. They must be necessary, because that is what “require” means, and measures will be not necessary where a party can be adequately compensated by an award of damages if it successfully vindicates its rights when the case is finally decided. Thus, as the Respondents correctly submit, many of the authorities express the test in terms of “irreparable loss”. Where action by one party may cause loss to the other which may not be capable of being made good by an eventual award of damages, the test in the Article is likely to be met. But the Article does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction (see paragraphs 55-58 below). Provisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them. Provisional measures will be granted if necessary, at the time of the decision, to preserve the effectiveness and integrity of the proceedings and avoid severe aggravation of the dispute.

### **The Tribunal’s Conclusions**

44. Perenco initiated this arbitration to protect its right to participate in oil exploration and production in Blocks 7 and 21 pursuant to the respective Participation Contracts for the financial reward specified in those contracts, irrespective of the price of oil in Ecuador or the world at any given time. Its complaint is that the enhanced payments demanded pursuant to Law 42 substantially reduce the financial reward to which, under the Participation Contracts, it is entitled, and it contends that Law 42 cannot validly supersede a contract binding on Ecuador in international law. The dispute at the heart of this arbitration concerns Perenco’s

rights under the Participation Contracts, as a matter of Ecuadorian Law and under the BIT, and the effect (if any) on those rights of Law 42.

45. Perenco's claim is not one which can, in the Tribunal's opinion, be peremptorily rejected. It was because, in a changed oil market, the Participation Contracts were felt to yield an inadequate and unfair return to Ecuador that Law 42 was enacted and the decrees made pursuant to it. The object was to re-allocate the proceeds of oil production in Blocks 7 and 21 to the advantage of Ecuador and the corresponding disadvantage of Perenco. Modification of the Participation Contracts was the means chosen to achieve this object.

46. On the material currently before the Tribunal, it seems clear that, as matters now stand, and in the absence of provisional measures, Perenco faces the imminent seizure of its assets in Ecuador (whether oil, plant, equipment or bank balances) to the extent of US\$327 million, plus interest and costs, unless it pays that sum within a very few days. It appears from a letter sent by Perenco's counsel to the Tribunal on 29 April 2009 (to which Ecuador has had no more than a brief opportunity of responding) that further steps may already have been taken. If Perenco's business in Ecuador were effectively brought to an end in this way, such injury could not, in the Tribunal's judgment, be adequately compensated by an award of damages should its claim be ultimately upheld. The Tribunal notes that Perenco amended its original Request for Arbitration to claim, as one of six heads of relief, orders that the Respondents reinstate fully Perenco's rights under the Participation Contracts according to their terms, and do not further derogate from those Contracts by, among other things, unilaterally amending, rescinding, terminating or repudiating the Contracts or any terms thereof. Thus Perenco specified restitution as a form of relief requested. In the Tribunal's judgment, the seizure of Perenco's assets, as described above, would seriously aggravate the dispute between the parties and jeopardise the ability of Perenco to explore for and produce oil in Blocks 7 and 21 pursuant to the Participation Contracts.

47. In a well-researched and well-argued submission the Respondents have advanced substantial reasons why the Tribunal should not consider that the present circumstances require the grant of provisional measures.

48. First it is said that, by pleading that its interests have been “expropriated” (as in para 36 of the Request for Arbitration), Perenco has chosen a remedy inconsistent with a claim to protect its rights under the Participation Contracts. Paragraph 36 was drafted with express reference to Article 6 of the Treaty, of which a breach was alleged. But Perenco’s case is and has always been that the Participation Contracts remain in force according to their letter; that it has continued to perform them according to their letter; and that it wishes to continue to do so. The Respondents for their part do not contend that the Contracts have been terminated, and have confirmed (paragraph 27 above) that neither of them has commenced proceedings towards termination of the contracts. Had the contracts been terminated, it may be (this Tribunal need express no opinion) that the principle articulated by the Tribunal in the Decision on Provisional Measures in *Occidental v Ecuador*, would be applicable. The relevant contracts in that case had been terminated, and the Tribunal ruled (paragraph 79):

”It is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or license, or any other foreign investor’s entitlement, specific performance must be deemed legally impossible”.

It went on to rule (paragraph 86):

“In conclusion, it is the Tribunal’s view that the Claimants have not established a strongly arguable case that there exists a right to specific performance where a natural resources concession agreement has been terminated or cancelled by a sovereign State”.

Irrespective of whether the *Occidental* Tribunal was correct in this view, on which this Tribunal takes no position, on the materials currently before this Tribunal, there having been no such termination or cancellation, the principle invoked by the *Occidental* Tribunal is inapplicable.

49. The Respondents contend, secondly, that as an independent sovereign State Ecuador has the right to control its own natural resources, that Law 42 was lawfully enacted under the law of Ecuador, that Law 42 has been held to be constitutional by the highest legal authority in the State, and that any interference with the operation of Law 42 by the Tribunal would impermissibly infringe the sovereignty of Ecuador. The Tribunal would here repeat and adopt what was said by the Tribunal in the *City Oriente v Ecuador*, Decision on provisional measures, 19 November 2007, paragraph 43, where the effect of Law 42 was also in contention:

“... The Tribunal is very much aware that the Law was passed by the Legislative Branch of the State of Ecuador in exercise of its legitimate and undisputed national sovereignty and that, subsequently, the Constitutional Tribunal of that country, by Resolution of 22 August 2006, ruled that it does not violate the Constitution. It is for the Ecuadorian public authorities to enact the laws they deem appropriate for that nation’s common good, and the Tribunal neither can nor wishes to interfere in such legislative task. The Tribunal’s function in this case is limited to resolving any disputes arising in connection with the Contract” (Tribunal’s translation).

The same Tribunal, in its Decision on revocation of provisional measures (13 May 2008), paragraphs 56-57, repeated this passage and added:

“The Arbitral Tribunal ratifies this conclusion. An arbitrator lacks any jurisdiction to suspend Ecuador’s legislative powers or legislative acts emanating from the Ecuadorian Congress, and the Tribunal has never intended and much less ordered so. As clearly stated in paragraph 43 of its Decision [footnote omitted], ‘[t]he Tribunal’s function in this case is limited to resolving the disputes arising in connection with the Contract’. And this is what has happened: what the Arbitral Tribunal has suspended through the Provisional Measures are not Ecuador’s legislative acts, but rather any compulsory or coercive measure or act by Petroecuador or Ecuador resulting in interference with contractual rights including Claimant’s right to demand performance of the Contract” (Tribunal’s translation).

The Tribunal granted, and declined to revoke the grant of, provisional measures. In paragraph 90 of its revocation decision the Tribunal explained:

“First, the Tribunal reiterates once more its respect for the sovereign powers of the Republic of Ecuador and the right to dispose of its natural resources pursuant to any laws that the Ecuadorian public authorities deem appropriate. The Provisional Measures do not interfere with the exercise of those powers. They only establish that, on a provisional basis, while the impact of an enacted law is resolved, natural resources continue to be exploited pursuant to a Contract granted at the time by Ecuadorian public authorities, considering it then a valid and effective instrument to regulate its natural

resources. If Respondents consider that City Oriente owes them certain amounts, this arbitration is the perfect forum to make such claim” (Tribunal’s translation).

50. It is pertinent to recall that in any ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish. Interim measures may thus restrain a State from enforcing a law pending final resolution of the dispute on the merits, as in *City Oriente* and *Sergei Paushok v Mongolia*, Order of interim measures (UNCITRAL, 2 September 2008), or from enforcing or seeking a local judgment, as in *Electricity Company of Sofia & Bulgaria (Belgium v Bulgaria)*, 1939 P.C.I.J. (ser A/B) No 79, 5 December 1939, and *Ceskoslovensko Obchodni Banka AS v The Republic of Slovakia* (ICSID Case No ARB/97/4), Procedural Order No 4, January 11, 1999. While the enactment of a law by a sovereign State, upheld as constitutional in that State, is a matter of importance, it cannot be conclusive or preclude the Tribunal from exercise of its power to grant provisional measures. In *Victor Pey Casado and President Allende Foundation v Chile* (ICSID Case No ARB/98/2), Decision on the request for provisional measures, 25 September, 2001, the Tribunal observed, in paragraph 52:

“It is not necessary to stress again the principles and practice relating to the links between internal and international law, or the rule according to which a State should not invoke its domestic law to excuse or justify the breach of one of its international obligations” (English translation in 6 ICSID Reports, page 388, provided by the Claimant).

The effect (if any) of Law 42 on Perenco’s rights under the Participation Contracts, as a matter of Ecuadorian Law and under the BIT, is the issue at the heart of this arbitration. At this provisional stage, the Tribunal cannot approach the issue on the assumption that either party’s contention is correct. Its role, analogous to that of the *City Oriente* Tribunal, is to dispose of disputes arising between the parties in connection with the Participation Contracts.

51. The Respondents’ third and main answer to Perenco’s application for provisional measures hinges on their contention that Perenco can resolve its current problems by simply

making the enhanced payments required by Law 42 and withheld since April 2008. On this ground it is denied that such measures are necessary, since if Perenco is ultimately successful it will recover sums overpaid with interest and will suffer no irreparable loss. Since that solution is available to Perenco, the grant of relief is not urgent. Its alleged predicament is of its own making, and not caused by any action of the Respondents. The Respondents point out that in a letter of 19 May 2006 Perenco described the Law 42 payments as “mandatory” until the Law was declared to be unconstitutional; it had made the enhanced payments, under protest, until the end of April 2008; thereafter it and Burlington had, at least for a time, deposited the sums due under Law 42 into separate, segregated bank accounts. Perenco could resolve its difficulties by paying the full sum of US\$327 million due, which it was well able to do.

52. Perenco challenged the assertion that it was well able to pay this sum, which was due (if at all) from the Consortium and not it alone. It had no power or authority to advance payment on behalf of Burlington. This, the Respondents replied, was an internal matter between Perenco and Burlington and was no concern of theirs. Under the novated joint operating agreements pertaining to the two Blocks, Perenco was the sole operator and legal representative of the Consortium (the formation of which was required by the law of Ecuador), and was legally liable to perform the obligations of the Consortium.

53. It may very well be (the Tribunal is in no position to decide) that under the law of Ecuador the State is entitled to look to Perenco to satisfy the debts of the Consortium. But this, even if accepted, in the view of the Tribunal, begs a much more fundamental question. That question is whether, an arbitration having been initiated to determine whether Perenco’s rights under the Participation Contracts have been modified or superseded by the requirement in Law 42 that it make enhanced payments to Ecuador, not provided for in those contracts, circumstances should be considered by the Tribunal to require the grant of provisional measures to restrain Ecuador from taking imminent coercive action to enforce the making of

such payments. The Respondents accept that such measures would include the seizure of oil produced by Perenco in satisfaction of the sums allegedly due from the Consortium over such period as might be necessary to enable Ecuador to recoup its loss, a period which might extend to 18 months, during which Perenco would be likely to operate at a loss. Other assets could also be seized. It is realistic, in the Tribunal's judgment, to apprehend that Perenco's business in Ecuador would be crippled, if not destroyed.

54. In the judgment of the Tribunal, the grant of provisional measures in such circumstances is fully sanctioned by a long line of authority, laid down by the Permanent Court of International Justice, the International Court of Justice, ICSID Tribunals and at least one UNCITRAL Tribunal.

55. In its judgment of 5 December 1939 in the *Electricity Company of Sofia* case cited above, the Permanent Court of International Justice referred to

“the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken, which might aggravate or extend the dispute”.

This principle was invoked by the International Court of Justice in the *LaGrand* case (*Germany v United States of America* (2001 ICJ 466, 27 June 2001)) at paragraph 103, when it added that

“... measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court”.

The principle was also invoked by an ICSID Tribunal in the *Pey Casado* case cited above (25 September 2001), paragraph 69. In that case the Tribunal also cited, at paragraphs 70-72, the *Anglo-Iranian Oil Company Case*, and *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*). In the first of these cases, at page 93, the parties were restrained from taking any action which might prejudice the rights of the other

party in respect of the carrying out of any decision on the merits which the Court might subsequently render and from taking any action which might aggravate or extend the dispute submitted to the Court. In the second case, the ICJ recalled, at paragraph 44, that its statute gave it “the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require”. Listing the standards to be met before provisional measures would be granted, an UNCITRAL Tribunal in *Paushok v Government of Mongolia*, cited above, at paragraph 45, included “imminent danger of serious prejudice (necessity)”.

56. In *Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18), in its Order No 1 (1 July 2003), an ICSID Tribunal referred to Article 26 of the ICSID Convention, discussed below, and continued in paragraph 2:

”According to this basic principle, ICSID tribunals have repeatedly ruled:

- (a) that the parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, and in general refrain from any action of any kind which might aggravate or extend the dispute or render its resolution more difficult ...”

In the same case, in Order No 3 (18 January 2005), paragraph 7, a differently-constituted Tribunal observed:

“A provisional measure may also be granted to protect a party from actions of the other party that threaten to aggravate the dispute or prejudice the rendering or implementation of an eventual decision or award”.

In *Saipem S.p.A v The People’s Republic of Bangladesh* (ICSID Case No ARB/05/07), 21 March 2007, paragraph 175, an ICSID Tribunal held, after citing earlier authority, that under Article 47 of the ICSID Convention “a tribunal enjoys broad discretion when ruling on provisional measures, but should not recommend provisional measures lightly and should weigh the parties’ divergent interests in the light of all the circumstances of the case”. One of the members of the Tribunal in that case was Professor Christoph Schreuer, whose respected *Commentary on the ICSID Convention* (Cambridge University Press, 2001), in paragraph 15

(page 751), described several situations in which the conditions of necessity and urgency required for the grant of provisional measures might be present. These included: the necessity to take early measures to secure compliance with an eventual award; the necessity “to stop the parties from resorting to self-help or seeking relief through other remedies”; and the necessity “to prevent a general aggravation of the situation through international action”.

57. The Tribunal has paid close attention to the decisions of the ICSID Tribunal in *City Oriente v Ecuador*, cited above, in which the facts, although not identical with those here, were similar. At the heart of both cases lies a dispute concerning the recoverability of enhanced payments said to be required by Law 42. In its first decision on provisional measures (19 November 2007), the Tribunal said at paragraphs 55-59:

“55. Both Article 47 of the Convention and Rule 39(1) of the Arbitration Rules, require that the provisional measures be necessary to preserve the rights of the requesting party, without providing further explanations. However, the *travaux préparatoires* of the Convention stated that the purpose of the provisional measures should be to preserve the *status quo* as between the parties pending a final decision by the Tribunal. That is to say, in the Tribunal’s opinion, what Article 47 of the Convention authorizes is the issuance of provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of a future award or involving a party taking justice into its own hands. Whenever an agreement exists between the parties that has so far defined the framework of their mutual obligations, then the rights to be preserved are, precisely, those that were thereby agreed upon.

56. *City Oriente* is requesting this Arbitral Tribunal to issue provisional measures, by virtue of which the *status quo* existing prior to the enactment of the new Law No 2006-42 is maintained, and which it describes as a situation of compliance with the rights and obligations arising from the Contract, pursuant to the terms thereof.

57. In the opinion of this Arbitral Tribunal, the provisional measures requested by Claimant are necessary to safeguard Claimant’s rights and the claims it has asserted in this arbitration. Indeed, *City Oriente* is seeking an order to have the Contract performed pursuant to its original terms and conditions. Ecuador and Petroecuador understand that the rights and obligations arising from the Contract have not been affected or modified as a result of the application of Law No 2006-42, which is to be enforced on its own terms. Respondents may or may not be right – an issue pertaining to the merits on which the Tribunal cannot and should not rule at this time. However, while the matter is being resolved, the principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails. Consequently, Ecuador and Petroecuador shall continue to comply with the obligations that they voluntarily undertook in the Contract, pursuant

to the agreed upon terms, and they must refrain from declaring its termination or otherwise modifying its content.

58. Claimant has identified four acts by Ecuador and Petroecuador which, in its opinion, violate the *status quo* and need to be suspended.

The demand for payment

59. The first act is to order the payment of over USD 28 million, made by Petroecuador through the issuance of the invoice dated October 19, 2007, to which reference has been made above. In the Arbitral Tribunal's opinion, Respondents are required to refrain from demanding such payment or any other amount accrued not from the application of what was agreed upon in the Contract but, rather, of Law No 2006-42. Respondents, of course, may file a counterclaim and, should they succeed, the Tribunal will render an award ordering City Oriente to make payment of all such amounts, which award may be enforced by execution of any of City Oriente's rights and assets in Ecuador. However, in the meantime, the *status quo* must be maintained and the principles that the dispute is not to be aggravated and of *pacta sunt servanda* must prevail"

(Tribunal's translation)

In the Tribunal's opinion (paragraph 69), provisional measures were urgent, "precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration".

58. In its second decision, on revocation of provisional measures (13 May 2008), the *City Oriente* Tribunal reiterated the same rulings. It held (paragraph 58):

"City Oriente has a right to have the *status quo ante* maintained while the arbitration proceedings are pending, to continue to have the Contract fulfilled pursuant to the same terms agreed upon by the parties ... and to have Petroecuador and Ecuador refrain from adopting any unilateral measures of a coercive or compulsory nature compromising the balance".

It pointed out (paragraph 62) that without the provisional measures the Respondents might coercively collect amounts that were not required under the Contract, or even declare the expiration of the Contract: it repeated (paragraph 71) that enforced collection would operate as a pressuring mechanism, aggravate and extend the dispute, and, by itself, impair the rights which City Oriente sought to protect through the arbitration. The object of the provisional measures (paragraph 93) was that, pending a decision on the merits, the Respondents (in an

English translation of the Spanish original supplied to the Tribunal reference was erroneously made to “Claimants” when the word used in Spanish was “Respondents”, “las Demandadas”) should not aggravate the dispute or unilaterally modify the *status quo ante*, which was the one resulting from the terms freely agreed by the parties.

59. The Respondents criticised some aspects of the reasoning of the *City Oriente* Tribunal, but this Tribunal considers the decision to be legally sound and consistent with authority. It also considers it to be apt on the facts of the present case.

60. In paragraph 53 above the Tribunal has framed what is described as “a much more fundamental question”. The question must be answered in the affirmative. Having initiated this arbitration to challenge the recoverability of enhanced payments not provided for in the Participation Contracts but demanded pursuant to Law 42, Perenco should not, pending a final decision, be required to choose between making the very payments they dispute and suffering extensive seizure of its oil production or other assets.

61. As a variant on what is described above (paragraph 51) as their third and main argument, the Respondents contend that Perenco could resolve its current difficulties by making the required deposit and challenging the *coactiva* notices in the Ecuadorian courts. Perenco’s reasons for rejecting this course are, in large part, those already rehearsed. But it contends, in addition, that resort to the Ecuadorian courts by the Respondents or itself is inconsistent with Article 26 of the ICSID Convention. This provides:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy ...”

The object of this provision is not in doubt. It is to ensure that an ICSID Tribunal, duly constituted, has exclusive jurisdiction over any dispute of which it is seized. As the Tribunal observed in the second *Tokios Tokelés* decision cited above, in paragraph 7,

“Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative”.

The claims which the Respondents are invoking the legal process of the domestic courts to enforce are the claims which Perenco has brought this arbitration to challenge. It is, in the Tribunal’s opinion, inescapable that the Respondents’ resort to that process violates Article 26. It is also, in the Tribunal’s opinion, inescapable that Perenco would violate the Article if it were, in the domestic courts of Ecuador, to advance the arguments which it will rely on in this arbitration to challenge the recoverability of payments demanded under Law 42. Unless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration.

62. The Tribunal considers that circumstances require it to recommend, and it does recommend, provisional measures restraining the Respondents from:

- (1) demanding that Perenco pay any amounts allegedly due pursuant to Law 42;
- (2) instituting or further pursuing any action, judicial or otherwise, including the actions described in the notices dated 19 February and 3 March 2009, to collect from Perenco any payments Respondents claim are owed by Perenco or the Consortium pursuant to Law 42;
- (3) instituting or pursuing any action, judicial or otherwise, against Perenco or any of its officers or employees, arising from or in connection with the Participation Contracts; and

- (4) unilaterally amending, rescinding, terminating, or repudiating the Participation Contracts or engaging in any other conduct which may directly or indirectly affect or alter the legal situation under the Participation Contracts, as agreed upon by the parties.

As from the date of this Decision, the Tribunal's communications of 24 February and 5 March (paragraphs 28 and 35 above) shall cease to have effect.

63. Since the Tribunal may, in a later decision, hold that it has no jurisdiction to entertain this dispute, or that the Respondents are entitled to claim and enforce the enhanced payments required by Law 42, the Tribunal considers that the Respondents should enjoy a measure of security in relation to sums accruing due to them from Perenco (not the Consortium) under Law 42 from the date of this Decision forward until such later decision. It considers that such security is best provided by payment of the sums so accruing into an escrow account, from which sums will be disbursed on the direction of the Tribunal or by agreement of the parties. The Tribunal invites the parties to agree the terms and conditions on which such account may be established, and to establish it, within 120 days of the date of issuance of this Decision. If, at the end of that period, the parties fail to agree or act, either party may revert to the Tribunal.

#### **The Tribunal's communications of 24 February and 5 March 2009**

64. As recorded above in paragraph 37, the Respondents have challenged the propriety of the Tribunal's "request" of 24 February 2009 and its indication on 5 March that such "request" had the same legal quality as a "recommendation". The Respondents are understood to raise three objections of principle:

- (1) that the Tribunal had no power to make a request or recommendation without giving the Respondents an opportunity of presenting their observations, which it had not done;
- (2) that the Tribunal had no power to make a “request”, as it had purported to do on 24 February, since its power under Article 47 and Rule 39 was only to make a “recommendation”;
- (3) that it was procedurally unfair to the Respondents for the Tribunal to “change” the quality of its “request”, retrospectively, to that of a “recommendation”.

The Tribunal considers that it should address these objections at this stage. It wishes to preface its discussion of the objections with four points. First, it is observed that the power to recommend provisional measures under Article 47 of the Convention is not qualified by a requirement to first hear from both parties. It is a broad power vested in the Tribunal and is itself deserving of protection. In the Tribunal’s view, once putatively vested with jurisdiction to hear a claim (subject to resolving any objections thereto definitively), an ICSID tribunal has the duty to protect its jurisdiction to resolve the dispute that has been put before it. Second, if, having been served with an application for interim measures, a party could act in the period intervening between the application’s filing and the filing of its response to upset the *status quo* which the application sought to maintain, and to justify its action on the ground that Rule 39 disempowered the Tribunal from acting under Article 47 until it heard from both parties, a disputing party would have the power to prevent the Tribunal from exercising fully its jurisdiction under the Convention. It cannot be right that a Tribunal’s jurisdiction to grant interim measures is subject to a disputing party’s changing its relationship *vis-à-vis* the other disputing party during the briefing schedule. The Tribunal would reject such argument as being at variance with the broad power vested in it by Article 47. Third, the Tribunal notes that notwithstanding the vigour with which the Respondents have advanced their objection to the Tribunal’s “request”, their own communication dated 20 February 2009, implicitly acknowledged that the Tribunal has the power to act before hearing both parties on all issues

relevant to the application: in Ecuador's letter, which asserted that the Tribunal could not issue a "request" and proposed that the Respondents be granted approximately six weeks to file their observations on provisional measures, with reply and rejoinder to follow and a hearing to be held some two months hence, the Respondent undertook "to serve notice on the Tribunal granting enough time for the Tribunal to act as necessary, before it takes any measure to enforce the debts ..." Correctly, in the Tribunal's view, no attempt was made to argue that, once given notice of a measure to enforce the debts said to be owing, the Tribunal could act only if it heard from both parties. Finally, the context within which the Tribunal issued its request must be borne in mind. The speed with which the Respondents appeared to be moving to change the *status quo* while the briefing schedule was being decided, in the Tribunal's view, demanded a response.

65. Turning to the three stated objections, the Tribunal cannot accept the validity of the first objection. Even if it be accepted that the Tribunal's power under Rule 39(3) to recommend provisional measures on its own initiative is subject to the provision in Rule 39(4) that it may only recommend such measures "after giving each party an opportunity of presenting its observations", the procedural history in this case shows that the Respondents expressly objected to the Tribunal's power to issue the "request" that thereafter issued. The Respondents thus had an opportunity of presenting their observations as to the existence of the power which was exercised and did so in their letter of 20 February 2009 summarised in paragraph 25 above. In the same letter the Respondents also gave reasons for contending that such relief was not urgent or necessary. They proposed a timetable deferring a decision on provisional measures for upwards of two months which, on the facts, the Tribunal considered much too long a delay. It accordingly made its request, but it did so after receiving submissions in writing from both parties to the dispute. It is satisfied that the requirements of Rule 39(4) were met.

66. As to the Respondents' second objection, the Tribunal observes that Article 47 of the ICSID Convention and Rule 39(3) and (4) of the Rules must be interpreted in their contexts and in the light of their objects and purposes, all as required by Article 31 of the Vienna Convention on the Law of Treaties. Irrespective of the precise terminology used, the Tribunal's efforts to effectuate its mandate under a treaty by prevailing on the parties to maintain the *status quo* in the case before it are binding on the parties pursuant to their obligations under said treaty. Case law from other ICSID tribunals, the International Court of Justice, and the Iran-United States Claims Tribunal, all of which can be of assistance to ICSID arbitral panels (see, e.g., J. A. Rueda-Garcia, "Provisional Measures in Investment Arbitration: Recent Experiences in Oil Arbitrations Against the Republic of Ecuador", *Transnational-Dispute-Management.com*, at 25 March 2009) also supports the conclusion that Respondents' attempt to distinguish meaningfully between the Tribunal's use of the word "request" and the word "recommendation" found in Article 47 is unduly narrow.

67. In becoming a Party to a treaty such as the ICSID Convention (plus, as in this case, a bilateral treaty for the promotion and protection of investment binding the State Parties to ICSID arbitration), a State confers upon an arbitral tribunal jurisdiction over certain claims and assumes an obligation to take whatever steps might be necessary to comply with decisions rendered by the tribunal pursuant to the treaty. So long as and to the extent that the arbitration is in progress, both parties are under an international obligation to comply with whatever the tribunal issues as provisional measures for the purpose of protecting its jurisdiction and its ability, should it so decide, to grant the relief requested. State Parties to the ICSID Convention thus inherently are under an international obligation to comply with provisional measures issued by an ICSID tribunal.

68. This view of provisional measures is not new. It was first articulated over 60 years ago by Judge Manley O. Hudson of the Permanent Court of International Arbitration, who, in discussing the drafting process of the Statute for the Permanent Court of International Justice,

noted that the change from “suggest” to “indicate” in Article 41 of that Court’s Statute “may have been due to a certain timidity of the draftsmen, and that it is no less definite than the term ‘order’ would have been, and it would seem to have as much effect”: see Manley O. Hudson, “The Permanent Court of International Justice: A Treatise” 415 (1943) quoted in T. Elias, *The International Court of Justice and Some Contemporary Problems* 78-79 (1983). Furthermore, noted Hudson, the use of the word “indicate” did not lessen the obligation of a party to carry out measures “which ought to be taken”, pointing out that “an indication by the Court under Article 41 is equivalent to a declaration of an obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect”: *ibid.*

69. If the binding character of the word “indicate” in Article 41 of the ICJ’s Statute empowering it to impose binding provisional measures on parties was ever in doubt, the ICJ explicitly eliminated any lingering thoughts to the contrary in the *LaGrand* case, cited above:

“102. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of ‘the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute’. Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented [citations omitted]”.

Elsewhere the Court states (paragraph 110) that its prior indication of provisional measures in an Order of 3 March 1999 “was not a mere exhortation”, but rather had been adopted pursuant to Article 41 of its Statute and was “consequently binding in character and created a legal

obligation for the United States”. The Court held that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the ICJ, the United States had breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999. The parallels between “recommend” in the ICSID Convention and “indicate” in the ICJ Statute are quite clear, suggesting that one cannot rightly assume that a “request” is comparatively weaker than a “recommendation”, or that neither is binding.

70. Shortly after the decision in *LaGrand*, the European Court of Human Rights addressed the issue of interim measures under the European Convention for the Protection of Human Rights and Fundamental Freedoms: see *Mamatkulov and Askarov v Turkey* [GC], Nos 46827/99 and 46951/99, ECHR 2005-1 (Judgment of 4 February 2005). In concluding that Turkey, by not complying with interim measures “indicated” to it, had breached the Convention, the Court noted that in *LaGrand* the “ICJ brought to an end the debate over the strictly linguistic interpretation of the words ‘power to indicate’ in the first paragraph of Article 41 and ‘suggested’ in the second paragraph by concluding, with reference to the Vienna Convention, that provisional measures were legally binding”: see para 117. The ECHR adopted the ICJ’s conclusions and reinforced them with the views of several other international courts and adjudicative bodies, drawing attention to the near-universal agreement on the importance of interim measures in ensuring the “effective exercise” of the right of individual petition. The Court stated,

“123. ... in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect. The Court reiterates in that connection that Article 31 § 1 of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose, and also in accordance with the principle of effectiveness.

124. The Court observes that the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their

reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending [citations omitted]”

It is clear from the above that provisional measures have a significant role in the administration of public international law.

71. The Iran-United States Claims Tribunal has consistently issued “requests” imposing provisional measures that it regards as binding. That Tribunal operates for provisional measures purposes under Article 26 of the UNCITRAL Rules, which provides:

“1) At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2) Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3) A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.”

72. From the *E-Systems* case onward, the Iran-United States Claims Tribunal has used the word “request” when issuing provisional measures: *E-Systems v The Islamic Republic of Iran and Bank Melli Iran*, Award No ITM 13-338-FT (Feb. 4, 1983) reprinted in 2 *Iran-U.S. C.T.R.*

51. See also David D. Caron “Interim Measures of Protection: Iran-U.S. Claims Tribunal”, 46 *Zeitschrift für ausländisches-öffentliches Recht und Völkerrecht* 466, 509-510 (1986) (observing that the mandatory nature of a “request” in the Tribunal’s award was clear from the reasoning of the awards and became even clearer as a result of the way the Tribunal dealt with potential or actual non-compliance with the Tribunal’s “requests”). In that case, the Tribunal phrased its request as follows: “The Tribunal requests the Government of Iran to move for a stay of the proceedings before the Public Court of Tehran until the proceedings in this case before the Tribunal have been completed”: see note at p. 59. Since that early case the word

“request” has been used by the Tribunal uniformly in exercising its power under Article 26 of the UNCITRAL Rules to “take ... interim measures”, including cases in which it has acted entirely on its own initiative to restrain parties on a temporary basis pending its hearing a contested application for provisional measures.

73. With respect to the “request” *versus* “recommend” distinction, the Tribunal notes in particular the Concurring Opinion of Judges H. Holtzmann and R. Mosk in *E-Systems* (at pp 57, 64) which states that

“One might have preferred to express the obligatory nature, of the Interim Award by use of the word ‘orders’ instead of ‘requests’. It must be recalled, however, that this is addressed to one of the Governments which established the Tribunal by international agreement. It is to be presumed that such Government will respect the obligation expressed in the Interim Award stating what it ‘should’ do. Accordingly, we join with those who consider the term ‘requests’ is adequate in this context. In these circumstances we consider that a ‘request’ is tantamount to and has the same effect as an order.”

The Tribunal followed this decision with several others, all upholding the use of “requests” in its power to indicate binding provisional measures on the parties: see generally the cases collected at Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal*, 223-226 (Martinus Nijhoff, The Hague, 1998).

74. It is now generally accepted that provisional measures are tantamount to orders, and are binding on the party to which they are directed: see Zannis Mavrogordato and Gabriel Sidere, “The Nature and Enforceability of ICSID Provisional Measures”, 75 *Arbitration* 38, (2009), 41-42. The first ICSID tribunal so to hold was in *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No ARB/06/21), Decision on Request for Provisional Measures, 28 October, 1999, at para 9, where the Tribunal explained that

“While there is a semantic difference between the word ‘recommend’ as used in Rule 39 and the word ‘order’ as used elsewhere in the Rules to describe the Tribunal’s ability to require a party to take a certain action, the difference is more apparent than real ... The Tribunal does not believe the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal’s authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this

Order, the Tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order’”.

Several other tribunals have followed the reasoning in *Maffezini*, which derives its force from that tribunal’s belief in what the Contracting States party to the Convention intended: see, for example, *Tokios Tokelés v Ukraine*, cited above, para 4; *Occidental Petroleum Corp. and other v Ecuador*, cited above, para 58; *City Oriente Ltd v Ecuador*, cited above, Decision on Provisional Measures, para 52.

75. In *Victor Pey Casado v Chile*, cited above, para 22, the tribunal took another approach, one that made explicit the relevance of ICJ and Iran-United States Claims Tribunal jurisprudence on this point. The ICJ had at that time recently clarified in the *LaGrand* case that its power to “indicate” provisional measures under Article 41 of the ICJ Statute is binding on the parties. Most recently, the tribunal in *Roussalis v Romania* emphatically endorsed the view that provisional measures are “substantively binding”: ICSID Case No ARB/06/01, para 21.

76. The Tribunal cannot accept that a request, formally expressed, may properly be regarded as of less binding force than a recommendation. While different languages use different expressions, to recommend in ordinary English usage is to give advice which the addressee is ordinarily free to follow or not. The use of this deferential expression when addressing a sovereign State is understandable and well-understood. But a request is more positive, still deferential, but seeking a definite outcome. The language used by the Tribunal in its letter of 24 February (“The Tribunal believes it is necessary nonetheless, to request the parties to refrain from initiating or continuing any action or adopting any measure which may, directly or indirectly, modify the *status quo* between the parties ...”) could not reasonably be understood as extending an invitation devoid of legal consequences. The Tribunal cannot, accordingly, uphold the Respondents’ second objection.

77. Since the Tribunal does not accept that its communication of 5 March 2009 retrospectively converted what had been an invitation of a non-binding nature into a recommendation having legal force, the Tribunal cannot accept that the Respondents have suffered any procedural unfairness or that their third objection is valid. The object which its letter of 24 February sought to achieve was, or should have been, clear. On 27 February the Tribunal indicated that it would have to take a serious view of any failure to comply with its request. It was open to the Respondents, if in doubt about the effect of the Tribunal's request, to seek clarification from the Tribunal, which would have been readily forthcoming.

### **Decision on Provisional Measures**

78. The Tribunal repeats for convenience its rulings set out in paragraphs 62 and 63 above:

79. The Tribunal considers that circumstances require it to recommend, and it does recommend, provisional measures restraining the Respondents from:

- (1) demanding that Perenco pay any amounts allegedly due pursuant to Law 42;
- (2) instituting or further pursuing any action, judicial or otherwise, including the actions described in the notices dated 19 February and 3 March 2009, to collect from Perenco any payments Respondents claim are owed by Perenco or the Consortium pursuant to Law 42;
- (3) instituting or pursuing any action, judicial or otherwise, against Perenco or any of its officers or employees, arising from or in connection with the Participation Contracts; and

(4) unilaterally amending, rescinding, terminating, or repudiating the Participation Contracts or engaging in any other conduct which may directly or indirectly affect or alter the legal situation under the Participation Contracts, as agreed upon by the parties.

As from the date of this Decision, the Tribunal's communications of 24 February and 5 March (paragraphs 28 and 35 above) shall cease to have effect.

80. Since the Tribunal may, in a later decision, hold that it has no jurisdiction to entertain this dispute, or that the Respondents are entitled to claim and enforce the enhanced payments required by Law 42, the Tribunal considers that the Respondents should enjoy a measure of security in relation to sums accruing due to them from Perenco (not the Consortium) under Law 42 from the date of this decision forward until such later decision. It considers that such security is best provided by payment of the sums so accruing into an escrow account, from which sums will be disbursed on the direction of the Tribunal or by agreement of the parties. The Tribunal invites the parties to agree the terms and conditions on which such account may be established, and to establish it, within 120 days of the date of issuance of this Decision. If, at the end of that period, the parties fail to agree or act, either party may revert to the Tribunal.

[signed]

Lord Bingham of Cornhill  
President of the Tribunal

[signed]

Judge Charles N. Brower  
Arbitrator

[signed]

Mr. J. Christopher Thomas, QC  
Arbitrator